Transport Workers Union Peninsular Malaysia v Syarikat Perjalanan Terus Sabak Bernam-Kuala Lumpur Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–01–10 OF 2004
ABDUL AZIZ MOHAMAD, JAMES FOONG AND MOHD NOOR ABDULLAH JJCA
5 MAY 2006

Labour Law — Industrial Court — Jurisdiction — Application for interpretation of collective agreement — Whether Industrial Court could also make finding of fact to effectively determine complaint — Industrial Relations Act 1967 ss 29, 30, 33 & 56

Mohamad Kassim bin Shik Adam ('Kassim') was an employee of the respondent company ('the company'). On 5 May 2000, when his age was 53 years 11 months 11 days, he wrote to the company a letter headed 'Optional Retirement' in which he said 'I … hereby tender notice to terminate my employment with immediate effect' and asked for payment of 'the retirement benefits due under cl 15 of the Collective Agreement'. The collective agreement was one between the company and the appellant union ('the union'), of which Kassim was a member. Clause 15.1 of the collective agreement said: 'Employees who leave the service of the company shall be paid retirement benefits [sic] based on the length of service and the last drawn wage'. One of the grounds of entitlement to retirement benefits was stated by cl 15.3.1 to be 'Retirement at the age of 55 years or at the optional retirement age of 45 years.'

The company refused to pay Kassim the retirement benefits, and instead treated Kassim's case as one of resignation. The union, in reference to Kassim, lodged a complaint with the Industrial Court under sub-s (1) of s 56 of the Industrial Relations Act 1967 ('the Act'). Later, the union, in reference to Kassim, made an application dated 4 December 2000, under sub-s (1) of s 33 of the Act for a decision on the question of the interpretation of cl 15.3.1 of the collective agreement. As far as interpretation was concerned, the question was whether retirement benefits were 'only payable if an employee retires exactly at the age of 55 years or 45 years'. The finding by the Industrial Court that Kassim was entitled to retirement benefits implied a finding that Kassim, by his letter dated 5 May 2000, had validly gone on optional retirement, and not just resigned from his employment. The High Court quashed the award of the Industrial Court, on the ground that by making that finding, the Industrial Court, in an application for interpretation under s 33(1), had indirectly determined the complaint under s 56 in the union's favour. The High Court was of the view that the Industrial Court did not have jurisdiction to make such a finding in an application under s 33(1) because the section was for the specific purpose of interpretation only. The union appealed.

The union relied on *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' union* [1995] 2 MLJ 317 as authority for the proposition that in an application for interpretation under s 33(1) the Industrial Court may make findings of fact.

Held, dismissing the appeal:

(1) It is perfectly logical and unexceptionable that in deciding under s 56 whether there has been non-compliance with an award or collective agreement, there may be an incidental necessity to determine the meaning of the award or collective agreement or a particular provision, word or expression in it, so that the interpretation becomes an integral part of determining the question of non-compliance. But in an application for interpretation under s 33(1), the same cannot be said of the making of a finding of fact that provides the basis for a finding of non-compliance, because it is not necessary to interpretation that a finding of fact, which necessarily arises because there is a dispute of fact, be made. The finding of fact will not be a necessary incident of interpretation. There will have to be affidavits to enable the Industrial Court to decide the dispute of fact. The character of the proceedings under s 33(1) will change. In the present case, the question whether Kassim retired or resigned was a disputed question, the company maintaining that Kassim resigned. Therefore, that the union's reliance on *Syarikat Kenderaan Melayu Kelantan* was of no avail to it in the circumstances of this case (see para 17).

(2) Reliance on the power of the Industrial Court under para (g) of s 29 of the Act was misconceived. The matter before the Industrial Court was the interpretation of cl 15.3.1 as to the entitling age of retirement. It was not necessary or expedient for the expeditious determination of that question to decide also that Kassim did retire optionally and was entitled to retirement benefits (see para 21).

(3) The reliance on s 30(5) in favour of Kassim was again misconceived. In the first place, it was not a mere matter of technicality or legal form to require that the Industrial Court should make the finding that it did in an application under s 33(1), since the proceedings were not designed for determining disputes of fact and, therefore, there had been no opportunity to air the facts and no examination of them. It is a matter of fairness and justice. In the second place, there was in fact a failure to act according to equity and good conscience towards the company, so that the subsection should apply, if at all, in favour of the company (see para 22).

[Bahasa Malaysia summary

Mohamad Kassim bin Shik Adam ('Kassim') adalah seorang pekerja dalam syarikat responden ('syarikat'). Pada 5 Mei 2000, semasa beliau berusia 53 tahun 11 bulan 11 hari, beliau telah menulis kepada syarikat itu sepucuk surat dengan tajuk 'Optional Retirement' di mana beliau mengatakan 'I … hereby tender notice to terminate my employment with immediate effect' dan bertanyakan bayaran 'the retirement benefits due under cl 15 of the Collective Agreement'. Perjanjian kolektif itu adalah antara syarikat tersebut dan persatuan perayu ('persatuan'), yang mana Kassim merupakan ahli. Klausa 15.1 perjanjian kolektif menyatakan: 'Employees who leave the service of the company shall be paid retirement benefits [sic] based on the length of service and the last drawn wage'. Salah satu alasan kelayakan faedah persaraan dinyatakan oleh kl 15.31 adalah 'Retirement at the age of 55 years or at the optional retirement age of 45 years.'

Syarikat tersebut enggan membayar Kassim faedah persaraan, dan sebaliknya menganggap kes Kassim sebagai berhenti kerja. Persatuan tersebut, merujuk kepada Kassim, telah mengemukakan satu aduan kepada Mahkamah Perusahaan di bawah sub-s (1) kepada s 56 Akta Perhubungan Perusahaan 1967 ('Akta tersebut'). Berikutan itu, persatuan itu, merujuk kepada Kassim, telah membuat satu permohonan bertarikh 4 Disember 2000, di bawah sub-s (1) kepada s 33 Akta tersebut untuk satu keputusan berhubung pentafsiran kl 15.3.1 perjanjian kolektif tersebut. Setakat mana pentafsiran adalah berkaitan, persoalannya adalah sama ada faedah persaraan adalah 'only payable if an employee retires exactly at the age of 55 years or 45 years'. Penemuan oleh Mahkamah Perusahaan bahawa Kassim berhak terhadap faedah persaraan secara tersirat mendapati bahawa Kassim, melalui surat beliau bertarikh 5 Mei 2000, telah dengan sah memilih persaraan, dan tidak berhenti kerja. Mahkamah Tinggi membatalkan award Mahkamah Perusahaan, atas alasan bahawa dengan membuat penemuan tersebut, Mahkamah Perusahaan dalam satu permohonan untuk pentafsiran di bawah s 33(1), telah secara tidak langsung menentukan aduan itu di bawah s 56 yang menyebelahi persatuan tersebut. Mahkamah Tinggi berpendapat bahawa Mahkamah Perusahaan tidak mempunyai bidang kuasa untuk membuat penemuan sedemikian dalam satu permohonan di bawah s 33(1) kerana seksyen tersebut adalah untuk tujuan tertentu pentafsiran sahaja. Persatuan tersebut telah merayu.

Persatuan tersebut bergantung kepada *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' union* [1995] 2 MLJ 317 sebagai autoriti sebagai saranan bahawa dalam satu permohonan untuk pentafsiran di bawah s 33(1) Mahkamah Perusahaan boleh membuat penemuan fakta.

Diputuskan, menolak rayuan tersebut:

(1) Ia agak logik dan boleh diterima bahawa dalam memutuskan di bawah s 56 sama ada terdapat ketidakpatuhan dengan suatu award atau perjanjian kolektif, mungkin terdapat keperluan sampingan untuk menentukan maksud award atau perjanjian kolektif atau suatu peruntukan, perkataan atau istilah tertentu dalamnya, agar pentafsiran itu menjadi sebahagian yang menyeluruh dalam menentukan persoalan ketidakpatuhan. Namun dalam satu permohonan untuk pentafsiran di bawah s 33(1), ia tidak boleh dikatakan membuat penemuan fakta yang memperuntukkan asas satu penemuan ketidakpatuhan, kerana ia tidak perlu ditafsirkan bahawa satu penemuan fakta, yang semestinya timbul kerana terdapat pertikaian fakta, dibuat. Penemuan fakta itu tidak semestinya suatu yang perlu ditafsirkan. Perlu adanya afidavit-afidavit untuk membolehkan Mahkamah Perusahaan memutuskan pertikaian tentang fakta tersebut. Ciri prosiding di bawah s 33(1) akan bertukar. Dalam kes semasa, persoalan sama ada Kassim bersara atau berhenti kerja merupakan satu persoalan yang dipertikaikan, syarikat tersebut menegaskan bahawa Kassim telah berhenti kerja. Oleh itu, kebergantungan persatuan tersebut ke atas *Syarikat Kenderaan Melayu Kelantan* bukan suatu yang tidak ada guna kepadanya dalam keadaan kes ini (see para 17).

(2) Kebergantungan pada kuasa Mahkamah Perusahaan di bawah perenggan (g) s 29 Akta tersebut telah disalah tanggap. Perkara di hadapan Mahkamah

Perusahaan adalah pentafsiran kl 15.3.1 sebagai kelayakan umur persaraan. Tidak perlu atau wajar untuk penentuan yang cepat dan cekap berhubung persoalan tersebut untuk memutuskan juga bahawa Kassim sememangnya bersara secara pilihan dan berhak mendapat faedah persaraan (lihat perenggan 21).

(3) Kebergantungan kepada s 30(5) yang menyebelahi Kassim juga disalah tanggap. Pada mulanya, ia bukan satu perkara yang teknikal atau bentuk sah untuk menghendaki bahawa Mahkamah Perusahaan patut membuat penemuan yang ia lakukan dalam satu permohonan di bawah s 33(1), memandangkan prosiding tidak direka untuk menentukan pertikaian fakta dan, oleh itu, tiada peluang untuk menimbulkan fakta dan tiada pemeriksaan tentangnya. Ia suatu perkara yang adil. Keduanya, pada hakikatnya terdapat kegagalan untuk bertindak menurut ekuiti dan niat baik terhadap syarikat tersebut, agar subseksyen itu terpakai, jikapun, menyebelahi syarikat tersebut (lihat perenggan 22).]

Notes

For cases on jurisdiction of Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1323–1375.

Cases referred to

Malayan Agricultural Producers Association v National union of Plantation Workers [1992] 2 MLJ 57 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' union [1995] 2 MLJ 317 (folld)

Legislation referred to

Employment Act 1955 s 13(2)
Industrial Court Rules 1967 rr 14(1), 15(1)
Industrial Relations Act 1967 ss 33(1), (2), 56(1)

Appeal from: Application for Judicial Review No R2–25–56 of 2002 (High Court, Kuala Lumpur)

Marina Netto (Christy Marina & Associates) for the appellants.
Ambiga Sreenavasan (T Siva and E Sehu with her) (T Siva & Co) for the respondents.

Abdul Aziz Mohamad JCA (delivering judgment of the court):

[1] This was an appeal against the quashing of an award of the Industrial Court. By a majority decision (Mohd Noor Abdullah JCA, dissenting), we dismissed the appeal.

[2] Mohamad Kassim bin Shik Adam ('Kassim') was an employee of the respondent company ('the company'). On 5 May 2000, when his age was 53 years 11 months 11 days, he wrote to the company a letter headed 'OPTIONAL

RETIREMENT' in which he said 'I … hereby tender notice to terminate my employment with immediate effect' and asked for payment of 'the retirement benefits due under cl 15 of the Collective Agreement'. The collective agreement referred to was one between the company and the appellant union ('the union'), of which Kassim was a member. Clause 15.1 of the collective agreement said: 'Employees who leave the service of the company shall be paid a retirement benefits [sic] based on the length of service and the last drawn wage'. One of the grounds of entitlement to retirement benefits was stated by cl 15.3.1 to be 'Retirement at the age of 55 years or at the optional retirement age of 45 years.'

[3] The company refused to pay Kassim the retirement benefits. In a letter to the union dated June 20, 2000, the company said 'no retirement benefit due to [Kassim] upon his resignation on 5 May 2000 as he has not complied with … cl 15 …'. It may be observed that the company treated Kassim's case as one of resignation on 5 May 2000. On 3 July 2000, the union, in reference to Kassim, lodged a complaint with the Industrial Court under sub-s (1) of s 56 of the Industrial Relations Act 1967 ('the Act'), which provides for the lodging with the Industrial Court of any complaint that 'any term of any award or of any collective agreement … has not been complied with'. The Industrial Court is empowered by subsection (2), 'upon receipt of the complaint', to make certain orders. There is power [para (a)(i)] to 'make an order directing any party … to comply with any term of the award or collective agreement'.

[4] Later, the union, in reference to Kassim, made an application dated 4 December 2000, under sub-s (1) of s 33 of the Act for a decision on the question of the interpretation of cl 15.3.1 of the collective agreement That subsection says: 'If any question arises as to the interpretation of any award or collective agreement … any party bound by the award or agreement may apply to the [Industrial] Court for a decision on the question'. By r 14(1) of the Industrial Court Rules 1967, an application under s 33(1) shall be made in Form M. So the union used Form M. Form M required the union to state two matters: the provision requiring interpretation and the union's interpretation of it. The union stated these matters in an appendix attached to Form M, named Appendix A. In Appendix A the union, in paragraph 1, stated cl 15.3.1 as the provision requiring interpretation. In para 2, it stated: 'And whereas an employee named Mohd Kassim bin Shik Adam retired on 5 May 2000, at the age of 53 years, 11 month [sic] and 11 days'. It was an averment of fact that Kassim 'retired' and that he did so on the stated date and at the stated age. In para 3, the union raised what amounted to two questions. It did so in these words: 'Is this employee' — that is Kassim — 'entitled to be paid retirement benefits or is the benefit only payable if an employee retires exactly at the age of 55 years or 45 years?'. As far as interpretation was concerned, the question was whether retirement benefits were 'only payable if an employee retires exactly at the age of 55 years or 45 years'. The union gave its interpretation in para 4, that 'an employee who retires at any time after attaining the age of 45 years is entitled to the retirement benefits'. So far so good. That was the interpretation question. It was about the age ('the entitling age') at which an employee, not just Kassim, had to go on retirement or optional retirement in order to be entitled to retirement benefits. But earlier in para 3 the union had gone further and asked the other question: 'Is this employee entitled to be paid retirement benefits?'. That was a question the answer to which

required, first and foremost, before the interpretation question as to the entitling age under cl 15.3.1 could be of benefit to Kassim, a determination of the question whether there was a 'retirement' of Kassim on 5 May 2000, the answer to which question might depend on a consideration of the circumstances of Kassim's leaving the company and of the requirements, procedural or otherwise, for going on optional retirement. The other question in para 3 was not an interpretation question. The union itself seems to have recognised that it was not, for it did not give its answer to the question, as Form M required it to give by way of its interpretation, if it was an interpretation question. The statement in para 2 that Kassim 'retired on 5 May 2000' was not an answer to the other question in para 3. It was an assumption on which the union went when it sought interpretation of cl 15.3.1 as to the entitling age.

[5] In para 5 of Appendix A, the union prayed that the Industrial Court exercise the power given by sub-s (2) of s 33 and vary 'the award' in accordance with its interpretation of cl 15.3.1 given in para 4. Clearly the mention of 'the award' was a mistake. What was intended was the collective agreement, specifically cl 15.3.1. The subsection empowers the Industrial Court to vary any term of an award or collective agreement 'for the purpose solely of removing ambiguity or uncertainty'. Rule 15(1) of the Industrial Court Rules 1967 provides that an application for variation under s 33(2) shall be made in form N.

[6] The company, in its statement of reply, confined itself to the question of interpretation. Its reply essentially was that it is clear from cl 15.3.1 that an employee is entitled to retirement benefits either when he retires at 55 or when he exercises the option to retire at the age of 45, and not after attaining that age.

[7] In its award, the Industrial Court said that 'This court … agrees with the union's submission that cl 15 of the agreement means an employees [sic] may go on optional retirement after attaining the age of 45 years'. That was its answer to the question of interpretation. But it went on to say this: 'That is not the end of the matter. There is a second question. Has Mohd Kassim exercised his option to retire or did he resign from the service of the company? The company submitted that he had resigned because there was no request by him to take optional retirement and there was no consent from the company'. After stating its reasons, it said: 'Therefore the answer to this question whether employee is entitled to the retirement benefit is yes'. That implied a finding that Kassim's letter of 5 May 2000, was a valid exercise of the option to retire. In her oral submission in this appeal, the union's counsel said that that was essentially the award.

[8] On judicial review, the High Court granted an order of certiorari to quash the entire award. The learned judicial commissioner dealt with the issues raised before her under five grounds. I wish first of all to quickly dispose of two findings of the learned judicial commissioner as to matters that I did not think were of any significance. One was a finding, under ground 2, that the union should not have used Form M, but should have used Form N, to seek variation of cl 15.3.1. I have set out the background to this finding in para 5 above. The company's counsel said in this appeal that it was not an important point for the company since there was in fact no

variation that was ordered. The other finding was the finding, under ground 3, that the Industrial Court committed an error of law when, in stating the facts in the award, it misstated the age of Kassim as 54 years 11 months on 5 May 2000, whereas his age was 53 years 11 months. I thought that the error was not a factor that influenced the decision of the Industrial Court.

[9] The rest of the learned judicial commissioner's findings under each of all the grounds, except ground 5, overlapped to a great extent. Paraphrasing what she said and adding my own expression to what she appeared to mean to say but did not express, I would reduce her findings to the following. The finding by the Industrial Court that Kassim was entitled to retirement benefits implied a finding that Kassim, by his letter dated 5 May 2000, had validly gone on optional retirement, and not just resigned from his employment. That was a finding of fact on a question that would be relevant to the union's complaint under s 56, because if Kassim had optionally retired he was entitled to retirement benefits, and since the company had refused to pay the benefits, there had been non-compliance with cl 15 of the collective agreement. Therefore, by making that finding, the Industrial Court, in an application for interpretation under s 33(1), had indirectly determined the complaint under s 56 in the union's favour. The Industrial Court did not have jurisdiction to make such a finding in an application under s 33(1) because the section is for the specific purpose of interpretation only. That is the gist of the judicial commissioner's findings.

[10] The judicial commissioner also said, at p 9 of her grounds of judgment, that the case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' union* [1995] 2 MLJ 317, on which the union relied, 'did not state that the court may order compliance or arrive at a judgment that have [sic] the effect of ordering compliance while rendering an interpretation under s 33(1)'.

[11] Before us, the union raised several grounds for contending that the learned judicial commissioner erred in the findings set out in paras 9 and 10 above. First of all, the union continued to rely on the *Syarikat Kenderaan Melayu Kelantan* case as authority for the proposition that in an application for interpretation under s 33(1) the Industrial Court may make findings of fact.

[12] In that case the Industrial Court had ordered the reinstatement of certain workmen who had been dismissed and payment to them of their back wages, without mentioning whether 'back wages' included the special relief allowance under article 18 of the relevant collective agreement or the bonus under article 20. Dissatisfied with the employer's refusal to pay these, the union representing the workmen applied to the Industrial Court under s 33(1) for interpretation of the award and of articles 18 and 20. The Industrial Court refused to interpret the award because it was clear. The High Court ordered the Industrial Court to render an interpretation. The employer appealed to this court.

[13] At p 332 of the report the appellant employer's submissions are summarized. Nine points are listed. Points (2) and (8) are as follows:

(2) The suggestion by the respondent appears to be that the appellant acted contrary to the terms of the collective agreement. If that be the case, then it is open to the respondent to enforce the collective agreement upon a complaint of non-compliance under s 56 of the Act.

(8) The interpretative jurisdiction of the court is separate and distinct from its enforcement jurisdiction under s 56. The court being a creature of statute has no inherent jurisdiction to exercise these two powers together. No countenance ought to be given to an attempt to intermix the two distinct jurisdictions or to obtain relief under the latter in the guise of an approach under the former. If this is permitted, it would amount to an abuse of the established statutory machinery.

To go by those two points, part of the appellant employer's case was that the union's underlying motive was to show a case of non-compliance with the collective agreement on the part of the employer and therefore it should have brought a complaint under s 56(1) and not acted under the guise of interpretation under s 33(1) because the enforcement and interpretative jurisdictions are separate and distinct and cannot be exercised together.

[14] At p 333, the union's submissions are summarized into seven points. The union of course contended that it had properly resorted to s 33(1) for an interpretation of the award and that the Industrial Court should have determined whether 'back wages' in the award included the special relief allowance and bonus. The summary of submission in point (7) is as follows:

(7) It is not the law that the court ought never to exercise its interpretative power when dealing with a case of enforcement under s 56. Each case must depend on its own facts. The court could and should interpret an award or a collective agreement when considering a complaint of non-compliance under s 56 of the Act. Cases that appear to state the contrary are either wrongly decided or should be confined to their peculiar facts.

The union's point there was that in dealing with a complaint under s 56, the Industrial Court may interpret an award or a collective agreement. It is not apparent how the point was relevant to the union's defence of its resort to interpretation under section 33(1).

[15] This court found that the union had correctly resorted to s 33(1). At p 34B, Gopal Sri Ram JCA said:

> Having found that the respondent had correctly sought the exercise of the court's power to interpret the first award, it does not really become necessary to deal with the appellant's submission that resort ought to have been had to other remedies, including that provided for in s 56 of the Act. Nevertheless, in deference to the painstaking effort with which both counsel so fully argued this point, I think it behoves this court to deal with it.

This court ruled against the employer on that point for several reasons set out at pp 348–351. That point seems to refer to the employer's case in points (2) and (8) that are mentioned in para 13 above.

[16] Then at p 352, Gopal Sri Ram JCA dealt with 'the respondent's sixth submission', which could be a reference to the union's point (7) that is mentioned in para 14 above. Gopal Sri Ram JCA said this, and this is the passage relied upon by the union in this case:

A The dissenting judgment of Wan Suleiman SCJ in *Holiday Inn* [1988] 1 MLJ 306 certainly supports the respondent's contention. Apart from his opinion upon the effect of the ouster cl in s 33B of the Act, I find nothing objectionable in his Lordship's dissent in that case. Indeed, that dissent correctly recognizes that ss 33(1) and 56 cannot be treated as being housed in watertight compartments with no permissible overlap under any circumstances. The power of the court to interpret an award or a collective agreement which has been taken
B cognizance of cannot, to borrow the more descriptive language of Macbeth, be 'cabin'd, cribb'd and confined.

Accordingly, in my judgment, the question whether the court, when entertaining a complaint under s 56(1) of the Act has indeed acted in excess of its jurisdiction by exercising its powers under s 33(1) is one that depends upon the peculiar circumstances of a particular case.

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There may be circumstances, such as those as existed in *Federal Hotel v National union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175, which may warrant a superior court forming the view that an error of law has been occasioned by the court's unwarranted transgression of the power of interpretation when exercising its power of enforcement. On the other end of the scale, there may be cases in which an interpretation of an award
D or collective agreement is a sine qua non to ascertain whether there has indeed been non-compliance of the same. To say that in such circumstances the complainant is to be summarily driven away from the judgment seat because a question of interpretation has arisen, is to nullify legislative intent, namely, the expeditious settlement of industrial disputes. It follows therefore, that the extreme proposition that the court, when considering a complaint under s 56(1), may never interpret an award or collective agreement in any
E circumstances is fallacious and not worthy of a second glance.

Accordingly, I am of opinion that there is merit in the respondent's submission on this point.

[17] Although it was stated that 'ss 33(1) and 56 cannot be treated as being housed
F in watertight compartments with no permissible overlap under any circumstances', a statement which the union highlighted, that statement was made in the context of dealing with the question whether the Industrial Court, when considering a complaint of non-compliance with an award or collective agreement under s 56, could interpret the award or collective agreement. This court did not rule on the
G converse question of straying into the domain of s 56 when exercising jurisdiction under s 33(1). In any case, the statement in question does suggest that an 'overlap' is permissible only as an exception. The rule is compartmentalizing. It is perfectly logical and unexceptionable that in deciding under s 56 whether there has been non-compliance with an award or collective agreement, there may be an incidental necessity to determine the meaning of the award or collective agreement or a
H particular provision, word or expression in it, so that the interpretation becomes an integral part of determining the question of non-compliance. But in an application for interpretation, the same cannot be said of the making of a finding of fact that provides the basis for a finding of non-compliance, because it is not necessary to interpretation that a finding of fact, which necessarily arises because there is a dispute
I of fact, be made. The finding of fact will not be a necessary incident of interpretation. There will have to be affidavits to enable the Industrial Court to decide the dispute of fact. The character of the proceedings under s 33(1) will change. In the present case, the question whether Kassim retired or resigned was a disputed question, the company maintaining that Kassim resigned, as the union would have known from the company's letter to it dated 20 June 2000 mentioned earlier. I was of opinion,

therefore, that the union's reliance on *Syarikat Kenderaan Melayu Kelantan* was of no avail to it in the circumstances of this case.

[18] Another ground raised by the union was in reliance on *Malayan Agricultural Producers Association v National union of Plantation Workers* [1992] 2 MLJ 57. Although, as has been seen, Form M, the form for an application for interpretation under s 33(1), does not provide for the stating of facts, in that case the Supreme Court (Harun Hashim SCJ) said at p 61G:

> A s 33(1) reference, on the other hand, has to be precise so that on its face, the Industrial Court will know exactly the question it has to answer. The facts which give rise to the question *have to be stated but must not be disputed.*

The union's counsel said that the company's reply in this case did not show any dispute of facts. In Appendix A to Form M, the only fact stated by the union was in para 2, namely, 'an employee named Mohd Kassim bin Shik Adam retired on 5 May 2000, at the age of 53 years, 11 month [sic] and 11 days'. I understood that the union's counsel, by that submission, meant to say that it was not in dispute that what occurred on 5 May 2000, was Kassim's retirement, not resignation.

[19] In the first place, even going by the aforesaid quotation from the *Malayan Agricultural Producers Association* case, that fact ought not to have been stated in Appendix A, because, as I said, the union would have known by the company's letter dated 20 June 2000 that it was a disputed question. In the second place, the company was justified in viewing the question of interpretation to be answered as a question applicable to any employee and one about the entitling age of retirement in a proper case of retirement, and not a question applicable to Kassim particularly, as to whether Kassim retired or resigned on 5 May 2000. That is because the second question in para 3 asked 'is the benefit only payable if an employee retired exactly at the age of 55 years or 45 years?' and the union gave as its contention in para 4: 'The union submits that an employee who retires at any time after attaining the age of 45 years is entitled to the retirement benefits'. The question and answer clearly concerned 'an employee' and the entitling age of retirement. The company was therefore justified in not, in its reply, raising a dispute of fact that Kassim did not retire but resigned and in confining its reply to the interpretation of cl 15.3.1 as to the entitling age of retirement. In the third place, the Industrial Court itself treated the question as a disputed question, as evidenced by the following words at p 5 of the award: 'There is a second question. Has Mohd. Kassim exercised his option to retire or did he resign from the service of the company? The company submitted that he had resigned …' It was, therefore, not an undisputed question or fact.

[20] The union's counsel submitted that the Industrial Court did not make a compliance order under section 56(1). That is true, but this was what the judicial commissioner actually said at p 8 of her grounds of judgment:

> On this point I take note that the Industrial Court Chairman did not state specifically that there has been non-compliance of the award. However where the Industrial Court goes into the question of fact to determine if the second respondent had exercised his option to retire or resign, this would tantamount to the Industrial Court's dwelling to determine whether there has been non-compliance of the award.

To my understanding, what the judicial commissioner meant was that by impliedly finding that Kassim had gone on optional retirement, the Industrial Court had indirectly or virtually determined the complaint under s 56 in the union's favour. I have said this earlier in para 9. Although there had not been a compliance order under s 56, a disputed question had been decided in proceedings under s 33(1) — and decided without a proper airing and examination of the facts — which was crucial to the complaint under s 56(1) and the determination of which rendered the making of a compliance order a foregone conclusion. With the finding that Kassim was entitled to retirement benefits, and given the fact that the company did not pay him retirement benefits, a case of non-compliance by the company with cl 15 of the collective agreement would have already been made out, leaving the company with no fight under s 56.

[21] To justify the Industrial Court's finding that Kassim was entitled to retirement benefits, the union's counsel submitted that, according to para (g) of s 29 of the Act, the Industrial Court had power to:

> (g) generally direct and do all such things as are necessary or expedient for the expeditious determination of the matter before it.

The reliance on that power was misconceived. The matter before the Industrial Court was the interpretation of cl 15.3.1 as to the entitling age of retirement. It was not necessary or expedient for the expeditious determination of that question to decide also that Kassim did retire optionally and was entitled to retirement benefits.

[22] The union's counsel also relied on sub-s (5) of s 30 of the Act, which says:

> (5) The court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

The reliance on sub-s (5) in favour of Kassim was again misconceived. In the first place, it is not a mere matter of technicality or legal form to require that the Industrial Court should make the finding that it did in an application under s 33(1), since the proceedings were not designed for determining disputes of fact and, therefore, there had been no opportunity to air the facts and no examination of them. It is a matter of fairness and justice. In the second place, there was in fact a failure to act according to equity and good conscience towards the company, so that the subsection should apply, if at all, in favour of the company.

[23] The union, therefore, failed to show that the judicial commissioner erred in the findings summarized in paras 9 and 10 above.

[24] Under ground 5, the judicial commissioner dealt with the company's submission that the Industrial Court had erred in failing to consider that Kassim had failed to renew his driving licence as required by the contract of employment, thereby giving the company the right to terminate his employment under s 13(2) of the Employment Act 1955. In the appeal, the union submitted that the failure of Kassim to renew his driving licence was not pleaded in the company's statement of reply and therefore ought not to have been raised in the Industrial Court. Actually the union did not have to argue in the appeal about this question because the judicial

commissioner did not make a finding that the Industrial Court had erred in this respect. The findings summarized in paras 9 and 10 above were sufficient justification for the judicial commissioner to conclude that the award was made in error and to quash it, even if she had found in favour of the company under ground 5 and had erred in doing so.

[25] These grounds of judgment have the concurrence of my learned brother, James Foong JCA. My learned brother, Mohd Noor Abdullah JCA, was not able to produce the written grounds for his dissent before he went on retirement on 29 April 2006.

Appeal dismissed.

Reported by Loo Lai Mee